

WHAT USE ARE “ENTIRE AGREEMENT” CLAUSES ON CLAIMS FOR PRE-CONTRACTUAL MISLEADING OR DECEPTIVE CONDUCT?

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Legal Briefings - By **Mark Darwin and Nicholas Di Savia**

The High Court of England has recently affirmed¹ that an “entire agreement” clause does not exclude liability for misrepresentation. This article considers whether the law is the same in Australia and, if so, what is the point of an entire agreement clause?

An entire agreement clause typically appears in the general or “boilerplate” provisions of a contract, and typically says words to the following effect:

“This contract supersedes all prior discussions, representations, negotiations and understandings and states all the terms of the agreement between the parties in respect of its subject matter.”

KEY TAKE AWAYS FOR AUSTRALIAN CONTRACTS

1. An entire agreement clause is not a complete defence to a claim for pre-contractual misrepresentations (as is the case in England).
2. However, the clause is relevant in determining, as a matter of fact, whether there is the necessary causal nexus between the misrepresentation and the damage alleged to have been suffered as a consequence of entering the contract in reliance upon it. If it can be shown that the parties understood the entire agreement would exclude any prior

representations, the chain of causation will arguably be broken because the representation did not cause the loss or damage (as the party did not rely upon it).

3. This means that if you are concerned that a counterparty is relying upon pre-contractual negotiations that have not found their way into the final contract wording, it would be best to bring the entire agreement into the key provisions of the contract (and out of the boiler plate provisions), so that it is more difficult for the other party to claim reliance on the pre-contractual statements not included in the final version of the contract.

1. DOES AN ENTIRE AGREEMENT CLAUSE PROHIBIT A CLAIM BASED ON MISREPRESENTATIONS WHICH OCCURRED PRIOR TO THE CONTRACT BEING ENTERED?

The High Court of Australia in *Campbell v Backoffice Investments Pty Ltd*² made the position clear on this in reasoning:

*“It is as well to add, however, that, of itself, neither the inclusion of an entire agreement clause in an agreement nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before a contract was made constituting a contravention of the prohibition against misleading or deceptive conduct by which loss or damage was sustained.”*³

The statement has been directly applied in numerous cases, including the following:

- a. **Where a purchase contract was entered based on a pre-contractual representation as to the property’s value.**

In the Queensland Supreme Court case of *Juniper Property Holdings No 15 Pty Ltd v Caltabiano (No 2)*,⁴ false representations as to the value of the Soul Surfers Paradise penthouse were made prior to the purchaser entering the contract. The purchaser’s evidence was that he did not read the entire agreement clause - which Jackson J considered to be ‘not surprising or inherently unlikely’. Applying *Campbell*, Jackson J held that the presence of an entire agreement clause did not prevent the purchaser from claiming for misleading or deceptive conduct.

- a. **Where a contract was entered based on a representation that the party owned certain property.**

In the Federal Court of Australia decision of *United Petroleum Pty Ltd v Pentaco Oil (Aust) Pty Ltd*,⁵ the relevant contract stipulated that if Pentaco disposed of a site, they must first offer to dispose the interest to United. Prior to entering the contract, Pentaco had misrepresented that they owned seven petrol stations. Applying *Campbell, Moshinsky J* held that an entire agreement clause did not prevent United from succeeding in a claim for misleading or deceptive conduct.

Ultimately, this conclusion supports the fundamental principle that the *Australian Consumer Law* and its prohibitions against misleading and deceptive conduct cannot be excluded by contract.⁶

2. WHAT IS THE SIGNIFICANCE OF AN ENTIRE AGREEMENT CLAUSE WHEN MISLEADING OR DECEPTIVE CONDUCT IS ALLEGED?

An entire agreement clause may be considered relevant to the question of causation.⁷ Citing *Butcher v Lachlan Elder Realty Pty Ltd*,⁸ the High Court in *Campbell* held that:

“whether conduct is misleading or deceptive is a question of fact to be decided by reference to all of the relevant circumstances, of which the terms of the contract are but one”

Accordingly, the court will take the entire agreement clause into consideration in determining, as a matter of fact, whether the misrepresentation actually caused the loss, in the sense of whether (having regard to all the circumstances including the entire agreement clause) the party relied on the misrepresentation to enter the contract.

For example, in *Dylan Mann & Co Pty Ltd as trustee for the Mann Family Trust v Tiejag Pty Limited as trustee for the Skeihy Khoury Family Trust*,⁹ the entire agreement clause was the subject of careful negotiation between parties of equal bargaining power. As such, the court held that the plaintiff was unlikely to have relied upon any of the pre-contractual negotiations that realistically would have been included as terms in a carefully constructed contract had they been important, so the representation had not caused the loss.

As such, the significance of an entire agreement clause, similar to a disclaimer in a contract, will depend on the facts of each particular case, the prominence of the clause and the likelihood of reliance on the pre-contractual representation in all the circumstances.

ENDNOTES

1. *Al-Hawasi v Nottingham Forest Football Club* [2018] EWHC 2884 (Ch).
2. (2009) 238 CLR 304.
3. Paragraph 130.
4. [2016] QSC 5.
5. [2016] FCA 118.
6. *Secure Parking Pty Ltd v Woollahra Municipal Council* [2016] NSWSC 154, [112]; *Omega Air Inc v CAE Australia Pty Ltd* [2015] NSWSC 802 [31]; *Netaf Pty Ltd v Bikane Pty Ltd* (1990) 26 FCR 305.
7. *Dylan Mann & Co Pty Ltd as trustee for the Mann Family Trust v Tiejag Pty Limited as trustee for the Skeihy Khoury Family Trust* [2018] NSWSC 1334, [76]; *Netaf Pty Ltd v Bikane Pty Ltd* (1990) 26 FCR 305.
8. (2004) 218 CLR 592, 625 [109].
9. [2018] NSWSC 1334.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



MARK DARWIN
PARTNER, BRISBANE

+61 7 3258 6632
Mark.Darwin@hsf.com

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